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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 323

ALEXANDER L. GUTERMA

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

	PAGE
Preliminary Statement	1
Count 1	1
Counts 10 through 20	7
Count 5	16
Non-Compliance With the Orders of Discovery and Inspection	19
Conviction by Charts	21
Conclusion	27

Cases Cited

American Tobacco Co. v. United States, 328 U. S. 781, 787	9
Gratz v. Claughton, 187 F. 2d 46 (2d Cir., 1951), cert. den. 341 U. S. 920	25
Greenberg v. United States, 280 F. 2d 472, 476-477 (1st Cir., 1960)	25
Mortensen v. United States, 322 U. S. 369, 374	9
Securities and Exchange Commission v. Carlin, et al., Civil Action No. 60 Civ. 1713	3
Securities and Exchange Commission v. Guterma, Civ. No. 143-53	4, 7
Smolowe v. Dolendo Corporation, 136 F. 2d 231 (2d Cir., 1943, cert. den. 320 U. S. 751)	25

PAGE

Turnipseed v. United States, 272 F. 2d 106 (7th Cir., 1959) 8

United States v. Crowe, 188 F. 2d 209 (7th Cir., 1951) 27

United States v. Feldman, 136 F. 2d 294 (2d Cir., 1943) 27

United States v. Guterma, 272 F. 2d 34 19

United States v. O'Connor, 237 F. 2d 466 (2nd Cir., 1956) 22

United States v. Puff, 211 F. 2d 171 (2d Cir., 1954) .. 27

United States v. Williams, 341 U. S. 58, 64 9

Walet v. Jefferson Lake Sulphur Co., 202 F. 2d 433 (5th Cir., 1953), cert. den. 346 U. S. 820 25

STATUTES CITED

Judicial Code:

Title 28 U.S.C., Section 1733(b) 7

Federal Rules of Criminal Procedure:

Rule 27 7

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Preliminary Statement

In its brief, the Government has chosen to emphasize factual questions which petitioner covered fully in his briefs in the Court of Appeals but which did not appear appropriate for inclusion in a petition for certiorari, under this Court's Rule 19. Since the Government has now raised them, however, petitioner will dispose of them in this reply brief.

Count 1

In its brief in opposition, the Government says that "There is no merit to petitioner's contention that the evidence is insufficient to support his conviction on Counts

1 and 10 through 20—involving the failure to file 'insider reports' " (Govt. Brief, p. 16). With respect to Count 1, the Government says at pages 10 and 11 of its brief:

> "In December 1958, the Judson Commercial Corporation caused its brokerage house to sell 4,600 shares of Jacobs stock for the petitioner's account (Tr. 1947-1948). These shares constituted part of the collateral on a $42,000 loan made by Judson to the petitioner earlier in the year (Tr. 1942-1943, 1946-1948). Judson, which was in frequent touch with the petitioner, in December 1958 and January 1959, informed him of the sales by telephone, in person and by written notice (Tr. 1979-1985, 2025, 2212, 2217-2218, 2228). Petitioner did not file an 'insider report' (Form 4) for December 1958 (Tr. 1032-1034)."

And, at page 16 of its brief, the Government states that "As for Count 1, petitioner knew that Judson Commercial had caused 4,600 of his shares in Jacobs to be sold by its brokerage house in December 1958 (Tr. 1946, 1949, 1979-1985, 2125, 2212, 2217-2218, 2228, 4786)".

Apart from the fact that no Form 4 report was filed by petitioner for the month of December 1958, this statement of the case relating to Count 1 bears slight resemblance to the facts as developed at the trial.

The Government's claims in Count 1 that such shares were owned by petitioner, that petitioner knew of such sales, had such knowledge on or before January 10, 1959, and that he wilfully and knowingly failed to report such sales. Wilfulness is an essential element of the offense charged. Absent proof that petitioner was aware that such sales had been made, and had wilfully failed to report them, such conviction cannot be sustained.

The Government has relied as to this solely upon the testimony on direct examination of Morton C. Carlin, of Judson Commercial Corporation. Carlin's entire testimony is of such a character as to be unworthy of belief.

and is indeed refuted by his own records and those of the Securities and Exchange Commission. On April 27, 1960 (shortly after the trial herein), in the Southern District of New York an injunction was issued, on consent, permanently restraining Carlin, Judson Commercial Corporation, and Joseph Wolfe from further violation of the fraud provisions of the Securities Act. (*Securities and Exchange Commission* v. *Carlin, et al.*, Civil Action No. 60 Civ. 1713.) Such action was based, in part, on Judson and Carlin taking securities which had been pledged with them as collateral for loans, and re-pledging such shares with sub-lenders without the knowledge or authority of the pledgors which is precisely what they did with petitioner's shares here.

On direct examination (Transcript, pp. 1940-42), Carlin testified that in the period from April 29, 1958, through May 9, 1958, he had sold 3,200 shares of F. L. Jacobs Co. stock belonging to petitioner which had been deposited with him as collateral on a loan made by him eleven days prior thereto (April 18, 1959), in an amount of $25,000.

On July 31, 1958, he sold an additional 1,000 shares which were collateral under this loan (Transcript, p. 2044). At that time he had realized proceeds of more than $24,000 under this loan of $25,000. And, on August 10, 1958, although a balance of $785 was all that was due under this loan, he sold another 4,000 shares of this same collateral for an additional $23,357.47.

Although he had realized more than $47,000 from the sale of collateral under a loan of $25,000, on August 20, 1958, he billed petitioner for monthly interest for the entire $25,000 amount of the loan, and continued to do so throughout the year, and he did not reflect any of the proceeds of such sales on the loan ledger card. (Transcript, pp. 2044-45, 2053, 2058, 2976, Exhibits ZZ and CCC).

Carlin also testified that in connection with a loan of $12,000 which he made to Comficor on December 17, 1958,

he received collateral of 2800 shares of Jacobs stock. The interest on this loan was prepaid, and he received a bonus of $450. Carlin testified and his records showed that between January 26, 1959, and February 17, 1959, he sold all 2800 shares for total proceeds of $16,010.57, $4,010.57 more than the amount of the loan. He did not notify Comficor of this, or turn over such surplus to them. Instead, he retained the $4,010.57 for himself as "an additional bonus on termination" and so marked his records (Transcript, pp. 2099-2195).

The transaction upon which the Government sought a conviction on Count 1 was the sale by Judson Commercial Corporation through Hertzfeld, Stern & Co. on December 24, 1958, of 4,600 shares of Jacobs stock belonging to petitioner, the settlement date of such sale being January 2, 1959. Carlin shrouded such sale in secrecy. Although he and Judson Commercial Corporation maintained brokerage accounts in their own names, the Hertzfeld Stern account was opened in the name of a minor employee, one Nathan W. Natsil (Transcript, pp. 1946, 1949).

Significantly, on March 6, 1959, Miss Eileen Evers, a member of the SEC legal staff, and Charles Greene, an SEC investigator, executed a joint affidavit filed in the District Court in the matter of *Securities and Exchange Commission* v. *Guterma* (Civ. No. 143-53), to which they attached a schedule of F. L. Jacobs Co. common stock pledged with various lenders, including Judson Commercial Corporation, and which schedule listed all shares so pledged, and all sales which had occurred of any such pledged shares (Exhibits SSS, OOOOOOO, PPPPPPP, QQQQQQQ, Guterma Appendix 184a-188a, Transcript, pp. 4179-4190, 4199-4208).

In such affidavit they stated that the schedule (Exhibit SSS) was based, among other things, upon the files of the money lenders who had done business with petitioner, Comficor, F. L. Jacobs Co., Chatham Corp., and Eveleigh, and

upon "interviews with the principals or officers of" such lenders.

The schedule contained in Exhibit SSS states that, on the basis of such records and such interviews, Judson Commercial Corporation made *no* sales of F. L. Jacobs Co. stock until January of 1959, that Judson Commercial Corporation still had on hand 21,200 shares of F. L. Jacobs Co. stock pledged with it, and that the sales effected by Judson were made through the brokerage firm of L. D. Sherman Co., Alkow & Co., Casper Rogers & Co., and Cohen Simonson & Co.

Thus, as of March 6, 1959, there was no record of any sales made in December, 1958, or made at any time through Hertzfeld Stern & Co., through whom the Government has claimed that 4,600 shares of Jacobs stock belonging to appellant were sold by Judson in December, 1958. And it will be recalled that such sales were made by Judson in the name of Natsil, its "minor employee" (Transcript, p. 1949). Looked at together with Judson's prior transactions under the April 1958, and December 1958 loans, a pattern appears whose only purpose could be to dispose of collateral and pocket the proceeds without the knowledge of the borrower.

Nor is there a basis for the statement that petitioner was informed about the sales. To the contrary, Carlin testified that he could not say that he knew that appellant was personally told about the sales.

Throughout Carlin's testimony he conceded that his communications and conversations were generally with Eveleigh and Lipton, and that he did not have any direct conversation with petitioner until some time in January 1959 (Transcript, p. 1980).

In the Court of Appeals, the Government claimed that petitioner was informed of Judson's sale of this stock by a telegram (Def. Ex. J3) in which Judson informed peti-

tioner that "due to the decline in the value of your collateral it is imperative that you send us your check for $10,000 by one P.M. Friday or we shall proceed to liquidate your account." The Government asserted that, in the face of these alternatives, petitioner's decision was "do not pay."

But this telegram was sent to petitioner by Judson Commercial Corporation on October 17, *1957*—one year and two months prior to the transactions involved in the indictment (Transcript, pp. 2086-87). It was placed in evidence to show that when Judson and Carlin in the ordinary course of their business were going to notify customers including petitioner of proposed sellouts of collateral they sent notice by telegram. And Carlin admitted that, although he had looked through his files for all papers and records relating to his loans to appellant on Jacobs stock at the request of the Government before coming to court, he had not found any telegram sent to petitioner relating to sales of Jacobs stock belonging to petitioner, and that he had no recollection of having sent such telegrams (Transcript, pp. 2086-2090).

There is one additional matter to be commented upon in connection with Count 1. In February of 1959, after the commencement of the civil proceedings by the Securities and Exchange Commission, there was full and public discussion and information concerning the sales of pledged Jacobs shares by lenders. This was extensively discussed in the proceedings before Judge Sugarman, and petitioner in such proceedings undertook to file the required Form 4 Report concerning any such sales by lenders of stock owned by him of which he had knowledge.

Petitioner in fact filed such a report with the Commission and the Exchange (Exhibit KKK for identification, App. pp. 152-157). It is inconceivable that, had petitioner known of any such sales by Judson, he would not have included them with the sales by Silver Company and Ufitec which were included in such report. Such report

was filed with the necessary explanatory matter as the result of petitioner's undertaking to do so before Judge Sugarman on February 23, 1959 (*S.E.C. v. Guterma; supra*, Transcript, pp. 328-338). Judge Sugarman said "If this man can make himself whole with the requirement of the law, then he should be given the opportunity to do so." To which Mr. Windels replied: "That is quite true and he will be." (*S.E.C. v. Guterma*, Transcript, p. 332).

A copy of such report, accompanied by a certificate of the Securities and Exchange Commission that it was a full, true and complete copy of such report was offered in evidence by petitioner. The Government had previously offered and the Court had admitted every Form 4 Report filed by petitioner other than this, *with a certificate from the SEC that as of February 10, 1960, no other reports had been filed by appellant.* (Ex. 180). *The February 27th report* was excluded (Transcript, 4321-26) on the ground that it was self-serving, although Rule X-16A-3(e) provides that such reports may contain any relevant explanatory matter. It is submitted that such exclusion was erroneous and prejudicial, and contrary to the provisions of Title 28, U.S.C., Section 1733(b), Rule 27 of the Criminal Rules, and elemental principles of justice and fair play.

Counts 10 Through 20

With respect to Counts 10 through 20, the Government erroneously states at page 7 of its brief that "Counts 10 to 20 charged failure to file 'insider reports' by petitioner's personal holding company, Comficor, Inc., when there were changes in Comficor's beneficial ownership of Jacobs stock at a time when Comficor owned more than 10% of Jacobs stock listed on a national stock exchange."

This is a complete misstatement of all of the essential elements in such counts.

There is no reference in the indictment to *listed* shares. The charge made is that Comficor was the beneficial owner of more than ten per cent of an equity security *registered*

on a national securities exchange, "namely the common capital stock of F. L. Jacobs Co.".

Nor is there any reference in the indictment to Comficor as a "personal holding company of petitioner". Indeed, no allegation is made as to any relationship existing between petitioner and Comficor. It does not allege that petitioner was an officer, director, or stockholder of Comficor, or in any way responsible for the filing of reports by Comficor. It does not allege that petitioner had any obligation to cause Comficor to file such reports. It alleges the obligation of Comficor to file such reports, and the nonfiling of them, and names petitioner as an aider and abettor.

The offense charged in Counts 10-20, which petitioner allegedly aided and abetted, is a violation of Section 16(a) of the Securities Exchange Act. Nowhere does Section 16(a) refer to securities *listed* on an exchange; it relates only to securities *registered* on an exchange. The terms *registered* and *listed* are quite different, as is indicated at pages 29-33 of petitioner's brief and pages 18 and 19 of the Government's brief. In disregarding the requirements of the statute, and substituting by rule an entirely different requirement of its own, the Commission has overreached its powers and arrogated to itself the powers of Congress.

By its inaccurate statement of what was charged in Counts 10 through 20, the Government has sought to supply to the charge essential elements which the charge itself lacks. The references referred to, *supra*, describing Comficor as petitioner's "personal holding company" are intended to suggest an obligation and responsibility on the part of petitioner to cause that corporation, of which he was not an officer, a director, or a substantial stockholder, to file reports required of it as a corporation. The indictment itself contained no such allegations or charges.

In the recent case of *Turnipseed* v. *United States*, 272 F. 2d 106 (7th Cir., 1959), it was held that to sustain a conviction as an aider and abettor, it is necessary to prove

that the alleged aider and abettor acted with knowledge that an offense was to be committed. In that case the mere inferences which the Government sought to draw were held to be insufficient. And, in *United States* v. *Williams*, 341 U. S. 58, 64, this Court held that aiding and abetting means to assist the perpetrator of a crime, and that merely being present does not make one an aider and abettor.

The record here shows nothing to indicate that petitioner ever did anything to deter or prevent the filing of reports by Comficor or that he had any responsibility for the filing of such reports. There was here a complete lack of relevant evidence from which the jury could properly find, or infer, beyond a reasonable doubt that petitioner had violated the reporting requirements of the act in connection with form 4 reports allegedly due from Comficor. *Mortensen* v. *United States*, 322 U. S. 369, 374; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 787.

Here positive indication was given to petitioner that Comficor was not a 10% stockholder and so subject to the reporting requirements when he was notified in November 1957 by the New York Stock Exchange that 1,190,036 shares of F. L. Jacobs Co. common stock were authorized to be listed. (Gov. Ex. 490, Gut. App. pp. 127a-134a.)

The representative of the Exchange testified that after such action of the Board of Governors of the Exchange in November 1957 no further authority or action was required with respect to the listing of any of such 1,190,036 shares. Thus, if such 1,190,036 shares comprised the listed shares of F. L. Jacobs Co., it would have been necessary for the Govenrment to establish that Comficor, Inc., was the beneficial owner of 119,003 shares in order to sustain the charges contained in these eleven counts of the indictment.

Of the 1,190,036 shares which were the subject of the Exchange's authorization of November, 1957 (Ex. 490), 151,442 shares were reserved for the exercise of options previously issued by the company (Transcript, p. 1896),

and 165,901 shares were reserved for exercise by preferred stockholders of the company to convert their shares into shares of common stock (Transcript, p. 1899). The remaining 882,607 shares were the shares which were then issued and outstanding as common stock in the hands of common stockholders.

The Government proceeded on the assumption that it had only to establish that in December, 1957, Comficor was the beneficial owner of 88,260 shares—i.e., 10% of the shares then issued and outstanding in the hands of the public. This was 30,743 shares less than the Government would have been required to show under a construction consistent with the language of the Commission's Rule X-3B-1, and urged by the defense.

Exhibit 431, prepared by Greene of the SEC for the Government for the purpose of establishing that the filing of such a report by Comficor for December, 1957, was required, made no reference to shares "registered" or "listed" but referred only to "shares issued and outstanding", disclosing a concept unrelated to the requirements of either the statute or of the rule.

The vice of such charts (Exhibits 431 and 432) lay in Greene's admission that, in preparing them, he had not referred to or taken into account the testimony of Government witnesses on cross-examination, nor defense exhibits, but had referred to and taken into account only the testimony of Government witnesses on direct examination, and Government exhibits. (Transcript, pp. 3008-9, 3013-4.)

Judge MacMahon ruled, in receiving these charts into evidence, that they were being received merely as summaries of the evidence already received. Judge MacMahon held that to examine Greene as to the accuracy of his summaries would "encroach" on the province of the jury. Thus, when defense counsel asked the first question of Greene concerning any consideration by him of cross-examination of Government witnesses, and the witness commenced his answer, Judge MacMahon interrupted and said in the presence of the jury:

"The Court: I am afraid that I must caution the witness not to make such statements, and I am sure it was unintentional. Whether there was anything in the cross-examination of Mr. Carlin which refutes what is shown in these schedules is again the province of the jury, and we must be careful here not to encroach on the jury's province. *But, Mr. Wels, if you want to encroach on it, however, in cross-examination, go ahead.*" (Transcript, p. 2999)

However, these exhibits completely failed to take into account that among the shares attributed to Comficor were 34,000 shares of Jacobs stock purchased by Comficor for the account of petitioner in the months of October and November 1957 and 20,000 shares which petitioner had purchased from Comficor in February and March 1958. Moreover petitioner had reported his beneficial ownership of such shares in Form 4 reports filed by him with the Exchange and the Commission in October and November of 1957, and in March of 1958 (Exhibit X).

Eliminating such 34,000 shares acquired in October and November, the maximum number of shares in which Comficor could have had a beneficial interest in December, 1957, was 95,800 shares,—23,203 shares *less* than the required ten per cent of the listed Jacobs shares.

The testimony that Comficor had included in its purchases shares which it purchased for the account and benefit of petitioner is conclusive. Wick, the Associate Director of Stock List of the Stock Exchange, testified that he had had conversations with petitioner in the spring of 1958 in which petitioner had told him that such purchases had been made for him by Comficor, and that petitioner had reported such purchases to the Exchange and Commission on Form 4 reports (Transcript, pp. 1049, 1095-6; Exhibit EE).

Lipton, the assistant treasurer of F. L. Jacobs Co., who also kept petitioner's personal checkbooks and records, and who placed the orders for many of the Comficor purchases, also testified as to such purchases by Comficor for peti-

tioner's account, and pointed out that, after petitioner's 1956 purchases of Jacobs Stock in 1956, and until his exercise of his stock options in September of 1958, none of the shares acquired by him, and as to which he filed Form 4 reports, were reflected by brokerage accounts or by checks to brokers (Transcript, pp. 1814-16).

Lipton's testimony was supported by the testimony of his assistant, Miss Shaid (Transcript, pp. 3150-51).

Further corroboration of this is found in the testimony of Miss Aiello that, although in this period the cash flow from Comficor to petitioner and Chatham Corporation, was somewhat in excess of $200,000 (Transcript, pp. 2784-5), in the same period petitioner and his personal holding company, Chatham Corporation, paid into Comficor a total of $1,229,500 (Transcript, pp. 2799-2804).

There was likewise testimony showing that Comficor engaged in purchases of Jacobs stock for persons other than petitioner, including Hal Roach and the persons from whom F. L. Jacobs Co. acquired its interest in Symphonic Electronics Corporation (Transcript, pp. 1816, 4170-76). The computation of the Government apparently includes as purchases by Comficor 11,800 shares purchased by Preston Industrial Corporation in which the principals were Pressman and Zisser. It is clear from Exhibits 340 and 341 and the testimony of Zisser (Transcript, pp. 2944-46) that such shares were acquired by Preston Industrial Corporation, and that Comficor's only interest in such shares was a participation in whatever profits would be derived from their liquidation.

Taking into account the 25,000 shares acquired by Comficor for Lippen of Symphonic in May of 1958 (Ex. 431, Transcript, pp. 1816, 4170-76), and the 20,000 shares acquired by Comficor for petitioner in March of 1958 and reported by petitioner on Form 4 that month (Ex. X), it was impossible for Comficor ever to have been a 10% beneficial owner of listed Jacobs stock. It will be recalled that on the back of the Form 4 forms (Exhibit X) the instructions state that "The reporting requirements relate only

to beneficial ownership, direct or indirect. Record ownership does not, of itself, constitute beneficial ownership".

The District Court erroneously charged the jury that, if they found petitioner's contentions with respect to the Comficor transactions to be correct, they might take this into consideration only with respect to two of the eleven Comficor counts—Counts 19 and 20, relating to the months of December 1958 and January 1959. The Court instructed the jury as to this as follows (Transcript, pp. 4918-19):

> "You may consider that contention in determining whether Comficor, Inc., failed to file a Form 4 in the mistaken belief that it was not the beneficial owner of more than 10% of F. L. Jacobs listed stock. In that event, however, Comficor's cumulative position would be less than 10% only in December 1958 and January 1959. If you accept the Government's position that Comficor owned the number of shares stated in the Government's chart, the question of the mistaken belief on the part of Comficor as to the total number of shares listed would apply only to Counts 19 and 20."

Adjustments to the Government's computation in Exhibit 431, only to the extent of reflecting petitioner's acquisition of 34,000 shares through Comficor in October and November 1957, and his subsequent acquisition from Comficor of 20,000 additional shares in March of 1958 (all reported by him on Form 4 reports), results in the following computation, demonstrating that in each of the months in question Comficor's beneficial ownership was less than 10%:

December, 1957	95,800
January, 1958	99,300
February	104,100
March	96,500
April	96,100
May	68,300
June	74,700
July	75,300
November	68,500
December	48,500

The Court also instructed the jury with respect to these counts that "In several Form 4's filed by Guterma, he never once claimed that he acquired Jacobs' shares indirectly from Comficor" (Transcript, pp. 4915-16). Of course, the Form 4 Report itself does not require the making of any statement as to the source of shares acquired, and does not call for any such statement (Ex. X). And the court's error in giving this instruction was further compounded by its instruction to the jury (Transcript, pp. 49-16) that "It is for you to decide on all the evidence in this case whether Comficor, Inc., was a mere holder of record or the beneficial owner of the Jacobs' stock it, purchased, pledged, sold, used and certified under oath as belonging to it." The court, here as on page 4914, lumped all stock purchased by Comficor, Inc., in the same way, without taking into account that different blocks of such shares represented different ownership, were the subjects of different transactions, and that substantial amounts of such shares had been pledged to secure loans to F. L. Jacobs Co., which were personally guaranteed by appellant.

The Government continues to take issue with the correctness of petitioner's understanding that, under the Commission's own rules and definition, "Listed Shares" included those shares reserved for conversion and the exercise of options, and as to which authorization to add to the list had been granted by the Exchange. Yet the comments of the trial judge and of the United States attorney with respect to this are such as to show that, at the very least, the statute and the regulations are so vague as to fail to establish an ascertainable standard of guilt.

Thus, Judge MacMahon at first sustained the position of the defense and said:

> "I hold that additional securities are listed when the notice has been given authorizing the addition of them. In other words, I hold the sentence after the semi-colon

means just what it says; it includes securities for which authority to add to the list on official notice of issuance has been granted." (Transcript, pp. 3718-19)

Thereafter he reversed himself, accepting the Government's contention that such shares did not become listed until issued (Transcript, pp. 3726-37). Later (Transcript, p. 3830) he seemed to revert to his original position.

In his charge to the jury, Judge MacMahon instructed the jury that such shares did not become listed until issued (Transcript, pp. 4917-18), and refused petitioner's request that the jury be instructed that such shares became listed upon the granting of authorization (Transcript, p. 4985). In his charge, Judge MacMahon said:

"In connection with the issue of wilful failure to file, the defense introduced applications to the New York Stock Exchange signed by Guterma and other officers of the Jacobs company for the listing of additional shares of F. L. Jacobs Co. common stock to be held in reserve for conversion of preferred stock and the exercise of stock options. The Stock Exchange granted all of these applications but required official notice of issuance before these reserve shares would be added to the list.

I instruct you as a matter of law that these reserve shares were not 'listed' within the meaning of the regulations. The chart introduced by the Government, therefore, if you believe the witness Wick from the Stock Exchange, accurately reflects the total number of shares listed in the months involved under the column labeled 'Shares outstanding'."

Significantly, such chart (Ex. 431) was one of the few exhibits called for by the jury during its brief period of deliberations (Transcript, p. 4998).

That appellant's contention as to the meaning of listed is correct, rather than the strained interpretation by the

Court, is indicated by the statement of the Assistant United States Attorney on page 3718 of the transcript:

> "In other words, once the Stock Exchange gives notice to the issuer that they have authority to add them to the list, they are included in the definition of 'listed'."

This is precisely what appellant has urged, and what Rule X-3B-1 says. And such notice was given by the Exchange as to all 1,190,036 shares in November of 1957.

Count 5

This is the count which charges petitioner with having wilfully, knowingly, and without just cause, hindered, obstructed, and delayed the filing of the Jacobs annual report for the fiscal year ended July 31, 1958. In its "summary" of the evidence relating to this count in pages 3-16 of its brief, the Government has closely followed the summary of the trial court of which petitioner claims. As in the case of the trial court's summary, an incomplete and highly prejudicial picture emerges.

Thus, at page 13, the Government states: "In May, 1958, the accounting firm of Ernst & Ernst discussed with petitioner and Eveleigh the impending audit of Jacobs for the fiscal year ending July 31, 1958 (Tr. 302, 306-309, 311-313). In a letter to the petitioner and Eveleigh on July 9, 1958, Ernst & Ernst stated that the audit would commence in a short time and that certain reports, supporting data, and audits of subsidiaries by others would be required (Tr. 521-523). Neither petitioner nor Eveleigh replied to the letter."

Like the trial court, the Government omits to refer to the fact that petitioner and Eveleigh as early as May informed Ernst & Ernst that accountants of the subsidiaries had been requested to cooperate fully with Ernst & Ernst, and requested that Ernst & Ernst get in touch with them in preparation for the audit, and that Ernst & Ernst failed

to act on this. Like the trial court, the Government omits to refer to the admissions by partners in Ernst & Ernst that they waited for several months before getting in touch with such accountants. And, like the trial court, the Government omits reference to the admitted resentment of Ernst & Ernst that their firm had not succeeded in taking over the accounts of the subsidiaries from the accountant who had them for years. And the Government also omitted reference to the statement of Ernst & Ernst that they "would not be pushed into hurrying the audit". (Transcript, pp. 347-349, 355-357, 360-365, 386, 389-391, 392-393, 400, 402-405, 412-416, 419-427, 428-434, 449-460, 500-503, 551-558; Ex. A.)

At pages 13-14 of its brief, the Government refers to the inability of Carey of the Ernst & Ernst New York office to contact Eveleigh for a two month period, although significantly no claim is made that Carey sought to contact petitioner. But, like the trial judge, the Government omits to state that no one from Ernst & Ernst had ever written to Eveleigh and advised him that Carey was being assigned to the Jacobs account. And, like the trial judge, the Government fails to refer to Carey's own testimony that, although he was within a few blocks of the Jacobs office several times a week during the period that he was endeavoring to contact Eveleigh, he never took the trouble to call, introduce or identify himself. And, in these references to Carey, the Government, like the trial court, omitted to state that petitioner took Carey before the Jacobs board of directors, and, after introducing him, asked him to tell the board what he still required to complete the audit, and asked everyone to cooperate with Carey in getting this (Transcript, p. 941). Indeed, every partner and employee of Ernst & Ernst who was called by the Government testified that petitioner responded affirmatively to all requests for assistance made to him.

The Government at pages 14-17 of its brief states: "By February, 1959, Ernst & Ernst had prepared an analysis

of Comficor's account, and gave petitioner two confirmation letters showing that Comficor owed Jacobs over $1,717,000 as of July 31, 1958". But the Government, like the trial court, omitted reference to Carey's own testimony that this could not have occurred because of Carey's own absence from New York in this period (Transcript, pp. 918-924, 929, 953-955, 954-956, 963-964, 964-976). The record is clear that this did not happen and could not have happened, since during this period petitioner was out of the country and Carey was in Atlanta in connection with the audit of another company.

Nor does the Government refer to the fact that, in connection with the "later meetings" referred to on page 15 of its brief, petitioner had ceased to be an officer or director of Jacobs prior to their occurrence.

In connection with the references to the account between Comficor and Jacobs, the Government, like the trial court, omits to refer to the fact that the larger balance allegedly due Jacobs was erroneous because funds which had been received by Jacobs from other companies for Comficor's account had not been credited to Comficor on the books because they had not been made directly (Transcript, pp. 1920-1922). And, although the Government, at page 8 of its brief refers as did the trial court to a flow of $2,114,000 from Jacobs to Comficor, it omits to refer, again like the trial court, to a flow of $1,382,000 flowing directly back from Comficor to Jacobs in the same period (Transcript, p. 1805), and to additional payments from other companies for Comficor's account (Transcript, pp. 1920-1922).

In footnote 7, at page 15 of the Government's brief, reference is made to conversations which petitioner had with Haas of Ernst & Ernst after he ceased to be an officer or director of Jacobs as to the location of the stock certificates for 40,000 Scranton shares owned by Jacobs. But the Government, like the trial court, omitted to state that an Ernst & Ernst partner testified that he had been told

by the Jacobs officers that such shares had been pledged, and with whom; that Ernst & Ernst then sent out letters of confirmation to such pledgees, and received back confirmations relating to 37,000 of the 40,000 shares in question, and never bothered to get in touch again with those who had failed to respond to the confirmation letters (Transcript, pp. 851-857, 860-862).

References are made at page 9 and elsewhere of the Government's brief to pledges of the Jacobs stock owned by petitioner, Eveleigh, and Comfi'or, and of Scranton shares owned by Jacobs "as collateral on loans made to petitioner, Eveleigh, Comfi'or, and Chatham". But the Government, again following the lead of the trial judge, omits to state that many of such loans were loans made to F. L. Jacobs Co., personally guaranteed by petitioner, and secured by Jacobs stock belonging to petitioner, Eveleigh, Comfi'or, and Chatham.

Non-Compliance With the Order of Discovery and Inspection

The discussion, at pages 22-24 of the Government's brief, of the Government's failure to comply with the order of discovery, reflects a confusion and lack of understanding as to what in fact occurred at the trial.

The references at page 33 to statements on pages 31 to 34 of the trial transcript obviously could have no relationship to documents offered subsequent thereto by the Government, and which had never before been seen by defense counsel. The records as to which the defense at that point had requested access were the defendant's own papers, impounded by the Government, and which the Court of Appeals in *United States* v. *Caterma*, 272 F. 2d 34, had directed should be released to the petitioner only a few days before the commencement of the trial. The Court of Appeals had referred this matter to Judge

Dimock for implementation of its decision, and Judge MacMahon had on December 2, 1959, denied a continuance for the purpose of permitting petitioner to study and review such voluminous records, and had ordered the trial to commence on December 7. At the time of such denial by Judge MacMahon, Judge Dimock had not yet held his hearing on the implementation of the decision of the Court of Appeals.

At page 23, of its brief, the Government says that "petitioner fails to point to any specific instance where the Government allegedly disobeyed the order of discovery." Instances of such non-compliance are reflected at, for example, Transcript, pp. 1521, 2109, 2238-224?a, 2519-2522, 2288-2291, 2956.

The prejudice sustained by petitioner by reason of this is indicated by the nature of such exhibits themselves. Thus, at pages 2888-91, the exhibits objected to were Exhibits 397, 398 and 407, the check books and minute book of Classic Carpet Corporation. The Government and its witness Locke conceded that these records had been in the Government's possession for months prior to Judge Noonan's decision. The Classic Carpet transactions assumed a major role in the Government's case, although there had been no reference to them in the indictment or anywhere else until such exhibits were offered at the trial.

The prejudice resulting from the surprise injection of these matters into the case becomes evident by reading the Government's emphasis upon these documents in its summation (Transcript, pp. 4714-22, 4772, 4811-24), and the description of this transaction as "Guterma's supreme jest" (Transcript, pp. 4811-4824).

Nor did the Government in complying with Judge Noonan's discovery order give any indication that the transaction which it claimed to be the subject of Count 9 was the transaction with Inland Credit Corporation in January 1959 whereby Jacobs' interests in Grand Rapids

Metalcraft Corporation were deposited as collateral for a $150,000 loan; which it had been specifically directed to produce. Yet, during the testimony of Lesser of Inland Credit, documents were offered by the Government relating to these claimed diversions and hypothecations which had not previously been available to appellant though in the Government's possession, and which were admitted over objection, which defense counsel permitted but a brief recess to examine them (Transcript, pp. 2519-22).

The Government has suggested that its failure to obey Judge Noonan's discovery order was cured by the Court permitting defense counsel to examine offered documents in a short recess of fifteen or twenty minutes, or by taking a luncheon recess "somewhat longer than usual". Such an examination of specific documents, without the opportunity for intensive pre-trial investigation into the circumstances of the transactions to which such documents related, was of little assistance to the defendants and certainly failed to accomplish the purpose of discovery—to permit defendants to come to trial prepared to meet the issues of fact as well as law there to be raised.

Certainly the matters as to which the trial court here charged the jury at pages 4964-66, 4962, and 4898 of the record, and which played the dominant role in petitioner's conviction, were not disclosed to be in issue by the indictment. The indictment gave the defendants no indication that they were to be prepared to meet such issues. Nor did they receive any further indication by the denial of the motions for bills of particulars. Had the Government complied with Judge Noonan's order of discovery, petitioner would have been on notice as to such issues and could have prepared his defenses as to them.

Conviction by Charts

At pages 24-25 of the Government's brief, there is discussion of Exhibit 21, a financial statement of F. L. Jacobs

Co. for the year ended July 31, 1958, which the accountants who prepared it refused to certify because they could not substantiate its contents, and which reflected speculation, opinion and guesswork. In footnote 14, on page 24, the Government incorrectly comments that none of the defendants moved to strike this exhibit. Defense counsel did in fact unsuccessfully move to strike such exhibit (Transcript, p. 864). But, even if they had not, on appeal an error such as this which seriously affects the fairness, integrity and public reputation of judicial proceedings could be corrected. *United States* v. *O'Connor*, 237 F. 2d 466 (2nd Cir. 1956).

Exhibit 21 was in large part based upon hundreds of entries made on the books of F. L. Jacobs Co. by one Locke, many months after petitioner had left Jacobs, and which Locke himself testified were not supported by documentation. The supposed "decrease" of $3,750,000 in the equity of Jacobs shareholders of which so much has been made resulted from arbitrary writedowns by Locke to $1 of substantial assets of Jacobs—and time and again Locke admitted that such writedowns had been made by him arbitrarily and without substantiation. The Government justifies the receipt in evidence of such entries on the ground that they were "items recorded in the formal books of account of Jacobs" (Govt. brief, p. 104), but, of course, it does not say on what such entries were based, or that they were made long after appellants had left Jacobs, and so could not be binding upon them. The Government likewise says that such entries "related to events prior to July 31, 1958" but it omits to disclose that none of such entries were made until the spring of 1959, that many of them were made long thereafter, and that they represented unsubstantiated revisions of prior entries made concerning the same transactions.

All of the charts prepared by Locke and Doyle which were received into evidence and taken by the jury into

the jury room (Exhibits 471 through 476, and Exhibits 493, 494 and 495) these exhibits were based on Exhibit 21, and each so states in the annotations attached to each of them.

Such charts included Exhibit 475, which is entitled "Pledges of 38,198 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs Co." The first pledges referred to on such chart "reflect" the pledge of 5,000 such shares on February 3 and February 5, 1958, by Comficor, Inc. with Reldan Trading Corp. The plain import of such reference is that Comficor on those dates pledged for its own benefit 5,000 shares of Scranton stock owned by Jacobs. But this is completely false.

The record shows that while such shares were still owned by the Zweifach group, the Zweifach group had itself pledged such shares with Reldan (Transcript, p. 2277). The record also showed that such shares were purchased from the Zweifach group, *not by Jacobs*, but by Comficor, under an arrangement whereby Comficor assumed the existing indebtedness due from the Zweifach group to Reldan on such shares. As Cohen of Reldan put it, "The proceeds of the Comficor loan paid off the Zweifach loan" (Transcript, p. 2277). And Zweifach himself testified that the purchase of such shares was made by Comficor rather than by Jacobs because the board of directors of Jacobs had not yet approved the acquisition of Scranton (Transcript, pp. 1306-7, Exhibits JJ and KK). So Comficor was not then pledging shares of Scranton owned by Jacobs, but its own shares. Yet this is not reflected in Exhibit 475, nor are any references made to this testimony in the annotations because Locke, like Greene, in preparing his charts only consulted the direct testimony of Government witnesses and Government exhibits, and ignored all testimony on cross examination as well as defense exhibits.

Again, on Exhibit 473 (entitled "Pledges of 18,461 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs

Co.) the import of this exhibit is that assets owned by F. L. Jacobs Co. were pledged for some improper purpose. The plain fact and testimony, however, is that the loan made in connection with such shares by Reldan was made simultaneously with the acquisition of such shares, and was part of the financing by which such shares were acquired by Jacobs from the Silett Group (Transcript, pp. 2276, 2654-2670, Exhibits 287, and 365 through 376). Reldan's check for the proceeds of this loan went directly to Jacobs' bank for deposit in Jacobs' account (Transcript, p. 2276).

Again, Exhibit 475 in column 9 "reflects" the pledge of 14,004 shares of Scranton stock with The Silver Company by Comficor. Doyle himself admitted that this was an error, and that this transaction involved 4,000 shares less than the exhibit stated (Transcript, pp. 3901-7).

In Exhibit 474 (entitled Pledges of 40,000 Shares of Scranton Corp. Stock Acquired by F. L. Jacobs Co.) the import of this caption, like the captions of the other charts, is that all of the shares referred to had been acquired by and belonged to F. L. Jacobs Co. Exhibit 474 reflects the pledge of F. L. Jacobs Co. 10,000 such shares with Alben Affiliates. Doyle himself admitted that these 10,000 shares belonged not to F. L. Jacobs Co., but to Hal Roach, Jr. (Transcript, pp. 3816-64). And Doyle likewise testified that other shares of Scanton stock belonging to Roach and others which had been pledged by Jacobs for loans made to Jacobs were not in any way reflected in these charts.

This, of course, is an essential factor in any honest understanding of the situations relating to pledges of Scranton shares. The testimony is clear that the shares of Scranton stock acquired by Jacobs were held by it in street name for purposes of facilitating the financing of the acquisition of such shares, and other loans. The testimony is likewise clear that such shares were commingled at the

Jacobs offices with 35,000 Scranton shares owned by Roach, and 5,000 Scranton shares owned by petitioner (and it should be noted that the number of shares which the Doyle charts claim were pledged by petitioner were 4,018, less than the number owned by him). And it is apparent from the testimony of Doyle, as well as from the testimony of the moneylenders, that the Scranton shares owned by Roach and Guterma were pledged as collateral for loans made by Jacobs, just as particular certificates owned by Jacobs were pledged for loans made to Comficor.

Stock certificates are fungible, and it is permissible for them to be replaced by others of equal quantities, qualities and use. *Smolowe v. Delendo Corporation*, 136 F. 2d 231 (2d Cir., 1943, cert. den. 320 U. S. 751); *Walet v. Jefferson Lake Sulphur Co.*, 202 F. 2d 433 (5th Cir., 1953), cert. den. 346 U. S. 820; *Gratz v. Claughton*, 187 F. 2d 46 (2d Cir., 1951), cert. den. 341 U. S. 920 (Transcript, pp. 4463-4466, 4872).

The impropriety of the use of such "evidence" to produce a conviction was recently noted in *Greenberg v. United States*, 280 F. 2d 472, 476-477 (1st Cir., 1960), where it was held to be improper to use the testimony of an "expert" like Locke.

The sum and substance of the statements made by the Government as to the supposed looting of F. L. Jacobs Co. are derived from the guesses of Locke as reflected in his "green ink" and "black ink" entries, and from Exhibit 21 based thereon, and the charts which purported to present a fantasy on the basis of Exhibit 21, and the testimony of Locke. What could be more misleading, prejudicial and inflammatory than the statement on Exhibit 476 that Comficor had obtained loans amounting to $1,065,000 on Scranton shares "acquired by F. L. Jacobs Co."? The plain fact, as adduced by the exhibits introduced by the Government through the moneylenders and by the moneylenders' own testimony, is that almost all of such loans

were made primarily upon shares of stock of F. L. Jacobs Co. and The Bon Ami Company owned by Comficor, and that Scranton shares were but a small factor in connection with these loans.

And, with its constant references to an identity between Comficor and appellant Guterma, the Government is in effect telling the jury through this chart that more than a million dollars went into "Guterma's pockets" through the medium of these loans. There is nothing to establish this. To the contrary, the record affirmatively shows that during the entire period the net cash flow between Comficor and Guterma was a net flow *from Guterma to Comficor* in excess of one million dollars (Transcript, pp. 2784-5, 2799-2804).

At pages 26 through 29 of the Government brief, an effort is made to justify the inclusion in the conspiracy count of the indictment of paragraph 7 which charged that it was a part of the conspiracy for petitioner and others to appropriate to themselves assets of F. L. Jacobs Co. — concededly, something in itself not a violation of Federal law.

The Government now claims that this was permissible, along with proofs of looting and embezzlement introduced under such paragraph of the conspiracy count, as establishing petitioner's motives for failing to file the required reports. That this was *not* the theory on which such evidence was received was made clear by the trial court when it refused the Government's request for an instruction that the jury might consider such evidence as proof of motive (Transcript, p. 4987).

Even if relevant to motive and intent, the proof must be limited, and not permitted to become so disproportionate to proof of the crime charged that it overwhelms proof of the crime charged and causes it be become so subordinated that it escapes consideration by the jury, resulting in a conviction for motive only.

The Government now also claims that proofs as to such matters were relevant and admissible on the issues of intent and motive, citing *United States* v. *Feldman*, 136 F. 2d 294 (2d Cir., 1943); *United States* v. *Puff*, 211 F. 2d 171 (2d Cir., 1954); and *United States* v. *Crowe*, 188 F. 2d 209 (7th Cir., 1951).

But those cases all stand for the proposition that *when a defendant takes the stand* he may be cross-examined as to such matters, even though they have not resulted in conviction—a proposition and rule which even the second circuit now appears to have abandoned since its decision in *United States* v. *Tomaiolo*, 249 F. 2d 683 (2d Cir., 1957).

What happened at the trial here was similar to that in *United States v. Feldman, supra*, where Judge Clark, in his dissenting opinion, recorded his disturbance at his feeling that the defendant "was tried and convicted of general amoral conduct rather than of specific intent to defraud by mail".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, N. Y., October 21, 1960.